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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

GRADY IVEY

VS.

STATE OF TEXAS

APPELLANT'S REPLY

TO

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rules 7 (3) and 12 (3) of the Rules of the Supreme Court of the United States, Grady Ivey, appellant herein, respectfully files this Reply to Appellee's Motion to Dismiss or Affirm which was served on Appellant on May 19, 1952, and for such reply would show:

Appellee misstates Appellant's position on several matters.

1.

We do not assert that the equal protection clause of the Fourteenth Amendment deprives a State of the "power to

classify in the exercise of police power." We do insist that there must be reasonable basis for such classification.

Appellee asserts that there is "no arbitrary or invidious discrimination imposed by the statute," but makes no attempt to support such assertion.

Appellant insists that discrimination is patent when for identical assaults a striking union member is branded a felon and is assessed a penitentiary term, while the non-striker is guilty, at most, of misdemeanor and subject to $5 to $25 fine.

In other words, equal protection is denied when Fennell (non-striker) is subject to a small fine for misdemeanor for assault at a picket line upon Adams (a striker); while Appellant Ivey (a striker) is subjected to felony conviction and prison term for assault at a picket line upon Fennell (non-striker).

Such discrimination can be supported only upon the premise that strikers pose a greater threat to the peace of the State than do employers or non-strikers. We have demonstrated in our Statement of Jurisdiction (p. 16) that there is no rational basis for such assumption. Appellee makes no attempt to demonstrate rational basis for the classification.

2.

Appellee's assertion that this Court's decisions in *Sanford v. Hill,* 316 U. S. 647 (1942) and *Cole v. Arkansas,* 338 U. S. 345, have "conclusively resolved" the issue against appellant is erroneous.

Sanford v. Hill, supra, does not foreclose Appellant. There a general "shot-gun" attack upon the Texas statute as a whole, principally on due process grounds—i. e., lack of certainty and definiteness—was held not to present a substantial Federal question. Buried in voluminous other assignments of error

in this Court was an attack under the equal protection clause. But in the light of the construction of the statute made by the Texas courts in that case, no substantial equal protection infringement was found. As we have demonstrated in our Statement of Jurisdiction, the Texas court has now abandoned the construction by which it sought to save the constitutionality of the statute in the earlier decision. Moreover, the *Sanford* case arose on habeas corpus before trial or conviction and constituted an adjudication as to the constitutionality of the statute *in vacuo*. In the instant case specific application of the statute has been made to impose more onerous penalty on striking union members than upon non-striking employees.

In its first opinion in *Cole v. Arkansas*, this Court noted that "serious objections" to the Arkansas counterpart of the Texas statute were raised under the equal protection clause, but the question was not reached in that case since the judgment was reversed on other grounds. 333 U. S. 196 at 202, 68 S. Ct. 514 at 517. On the second hearing of *Cole v. Arkansas* in this Court the equal protection point was neither raised nor decided. 338 U. S. 345, 70 S. Ct. 172.

3.

Appellee again misstates Appellant's position at pp. 5 and 6 of the Motion to Dismiss or Affirm. We do not assert that due process was denied "by the manner in which the Texas Courts permitted criminal intent to be proven." We are not in this Court merely raising the issue as to lack of evidence of unlawful intent. We recognize that questions of procedure and sufficiency of evidence are for the State Courts.

But we do insist that the Texas Court erred in holding that Texas may constitutionally give special felony classification to an assault by a striking employee where the statutory classification applies only on showing of specific intent to affect a

lawful vocation (an economic crime), and thereafter holding that such specific intent which classifies the offense may rest upon and be inferred from the normal acts of concerted activity under Federal statute (Taft-Hartley), and under the Constitutional right of free speech and assembly (including peaceable persuasion by other striking employees at other times), thus, in the final analysis, making the classification rest upon lawful acts and concerted conduct guaranteed lawful by the Constitution and by the Labor Management Relations Act (Taft-Hartley) 61 Stat. 136, 1947, 29 U. S. C. (Supp. IV) Par. 151 et. seq.

And we note that this Court has made explicit that:

> "... it is of prime importance that no constitutional freedom ... be defeated by insubstantial findings of fact, screening reality. That is why this court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552.

Moreover, Appellant is denied due process when evil intent of others is imputed to him merely on the basis that he is a member of the same union or engaged in the same strike.

Nor is Appellant accorded due process when an essential element of the crime of which he is accused—the intent to prevent pursuit of vocation—is presumed. For to deny a presumption of innocence to presume a defendant guilty, is to deny due process.

Alternatively, if such presumption does not deny due process, it certainly constitutes a whittling away of rights of speech and assembly guaranteed by the Federal Constitution and of rights of concerted activity guaranteed by the Federal Labor Management Relations Act.

WHEREFORE, Appellant respectfully prays that the Motion to Dismiss or Affirm be denied, and Appellant's Appeal be allowed.

Respectfully submitted,

L. N. D. WELLS, JR.,
Attorney for Appellant.